

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE MOONEY, JR.,

Defendant-Appellant.

UNPUBLISHED

July 15, 1997

No. 178516

Berrien Circuit Court

LC No. 94-000744-FH

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

MEMORANDUM.

Defendant pleaded guilty to aggravated assault, MCL 750.81a; MSA 28.276(1), and was sentenced to two years' probation and ordered to pay restitution of \$6,902.73 at the rate of \$150 per month. He appeals as of right. We affirm his conviction but remand to the trial court for a redetermination of whether he should be assessed restitution and, if so, in what amount.

At the time of the crime, the applicable restitution statutes, MCL 769.1a(8); MSA 28.1073(8) and MCL 780.766(10); MSA 28.1287(766)(10), provided that restitution was not to be ordered with respect to a loss for which the victim was compensated by insurance, except that "in the interest of justice" the court was permitted to assess restitution in favor of, inter alia, an insurer to the extent that it had compensated the victim. In *People v Gourd*, 200 Mich App 493, 496; 504 NW2d 699 (1994), this Court, noting the statutes' "general admonishment that restitution not be ordered with respect to a loss for which the victim . . . received or is to receive compensation," reversed an order of restitution to an insurer where, as here, the record contained no special facts "that lead us to conclude justice would best be served by ordering restitution to [the insurer]." Pursuant to *Gourd*, the trial court in the case at bar erred by ordering restitution that included an undetermined amount of insurance benefits paid or payable to the victim.

Although the restitution statutes were amended subsequent to the date of the instant offense and deleted the "in the interest of justice" language, upon remand defendant is entitled to application of the statutes in their pre-amendment form in order to obviate violation of the constitutional prohibitions

against ex post facto laws. See US Const, art I, § 10, cl 1; Const 1963, art 1, § 10. Consequently, on remand the trial court shall order restitution as it determines appropriate in accordance with the pre-amendment version of the statutes.

We affirm defendant's conviction and sentence of probation, but vacate the order of restitution and remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh